

Claimant was employed by the respondent as a dump truck driver from May 22, 1996, until his last day worked of August 7, 1996. Claimant alleged he started having low back pain approximately two weeks before the pain reached such severity that he could no longer continue working after August 7, 1996. Claimant contends that the driving of the

dump truck over various road surfaces caused his low back injury. The medical records of orthopedic surgeon, Don B.W. Miskew, M.D., contained in the preliminary hearing transcript, verify that claimant is in need of surgery as a result of a herniated intervertebral disc at L5-S1.

However, the Administrative Law Judge found that claimant had failed to meet his burden of proving by a preponderance of the credible evidence that his herniated disc resulted from an accident that arose out and in the course of his employment with the respondent. The Appeals Board has reviewed the preliminary hearing transcript and medical records attached thereto and agrees with the conclusion of the Administrative Law Judge.

The Administrative Law Judge had the opportunity at the preliminary hearing to personally observe the claimant testifying and two of the representatives of the respondent testifying. Both the representatives of the respondent, Dave Johnson, dispatcher, and James R. Gaston, vice-president and general manager, disputed claimant's testimony on whether claimant notified them that his low back injury was work-related and whether claimant requested respondent to furnish the claimant medical treatment. Claimant's testimony also conflicted with the medical records in regard to the cause of claimant's low back condition. Claimant testified he told the treating doctors that driving the dump truck for the respondent caused his back problems. However, none of the medical records reflected that history.

The Appeals Board finds that some deference should be given to the Administrative Law Judge in this case because he was able to personally observe all the witnesses that gave testimony in this matter. Therefore, the Administrative Law Judge was in a position to observe the witnesses' demeanor and to assess their credibility. Accordingly, giving some deference to the conclusions of the Administrative Law Judge, the Appeals Board affirms the Administrative Law Judge's preliminary hearing Order that denied claimant's request for preliminary benefits.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated November 6, 1996, should be, and is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

c: Richard C. Wallace, Lenexa, KS
Wade A. Dorothy, Lenexa, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director